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Supreme Court of the United States

OCTOBER TERM, 1964

No. 686

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

SUNFIRE COAL COMPANY, a corporation, and
ASHLO COAL COMPANY, a corporation

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS,
Partners, d/b/a Elkhorn Coal Company

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HARRISON COMBS,
900 Fifteenth Street, N.W.
Washington 5, D. C.

M. E. BOIARSKY,
511 Kanawha Valley Building
Charleston, West Virginia
Attorneys for Petitioner.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

SUNFIRE COAL COMPANY, a corporation, and
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UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS,
Partners, d/b/a Elkhorn Coal Company

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America (herein called "UMW"), prays that a writ of certiorari issue to review (1) the judgment of the United States Court of Appeals for the Sixth Circuit entered August 20, 1964, in case No. 15,502, styled *Sunfire Coal Company, a corporation, and Ashlo Coal Company, a corporation,* Plaintiffs-Appellees v. *United Mine Workers of America,* Defendant-Appellant, and (2) the judgment of the Sixth Circuit entered on the same date (August 20, 1964), in Case No. 15,503, styled *R. P. Price, C. H. Kelly and Follace Fields,*

Partners, d/b/a Elkhorn Coal Company, Plaintiffs- Appellees v. *United Mine Workers of America,* Defendant-Appellant, in each of which cases the Sixth Circuit affirmed the judgment of the United States District Court for the Eastern District of Kentucky[1] overruling UMW's motion to vacate the final order and judgment and award UMW a new trial in each case because of newly discovered evidence.

A certified appendix record in each case, together with the proceedings in the Sixth Circuit, is furnished herewith in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion, as well as the dissent of Circuit Judge Edwards, appears in Appendix C hereto, pages 10-18a, 18-22a; in each of the certified appendix records; and it is reported in 335 F. 2d 958 (Adv. Op. October 12, 1964).

While separate motions were filed in each case in the district court, the district court's opinion covered both cases. It is found in the *Sunfire* and *Price* certified appendix records (15a).[2] It appears in the Appendix to this Petition (A. 1a, 5a).[3]

JURISDICTION

The Sixth Circuit's judgments affirming the district court was entered in each case August 20, 1964 (A. 22a). This Court's jurisdiction is invoked under 28 USCA, Sections 1254(1) and 2101(c).

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[1]The United States Court of Appeals is herein called "Sixth Circuit". The United States District Court for the Eastern District of Kentucky is herein called either "district court" or "trial court".

[2]Where pagination is the same in each of the appendix records, no symbol will precede the page reference. If, however, pagination is different, page references to the *Sunfire* record will be indicated by the symbol "S."; and page references to the *Price* record will be indicated as "P."

[3]The symbol "A." refers to the Appendix to this Petition. Unless otherwise indicated, all emphases herein are supplied.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The original complaints in both *Sunfire* and *Price* invoked district court jurisdiction under Section 303, Labor Management Relations Act, 1947.[3a]

Following judgments against UMW in *Sunfire* (A. 3a) and in *Price* (A. 8a), UMW invoked the district court's jurisdiction to consider UMW's motions for a new trial based upon newly discovered evidence, which are under consideration herein, pursuant to Rule 60(b), Federal Rules of Civil Procedure.

QUESTION PRESENTED

Where, in actions under Section 303, Labor Management Relations Act, 1947, money judgments are entered against a labor union by a federal district court based upon jury verdicts of union responsibility and damages for tortious conduct imputed to the union without proof of the persons guilty thereof or that such persons were union agents, and the union, by motion under Rule 60 (b), Federal Rules of Civil Procedure, seeks a new trial and vacation of the money judgments on the basis of newly discovered evidence, disclosed for the first time more than a year following entry of the judgments in a police officer's affidavit introduced in a public hearing and in which affidavit the officer identifies persons, who were not agents of the union sued, as having committed various tortious acts, some of which were testified to in

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[3a] *Sunfire* originated as Case No. 559 in the district court and became No. 14,832 upon appeal (313 F. 2d 108). The motion to vacate judgment became No. 15,502 upon appeal. Pending appeal and prior to the Sixth Circuit's action thereon, UMW sought, but was denied certiorari, under this Court's Rule 20 (*UMWA* v. *Sunfire Coal Co.*, No. 448, 11 L. ed 2d 166).

Price originated as Case No. 559 in the district court and became No. 15,046 upon appeal (336 F. 2d 771). The motion to vacate judgment therein upon appeal became No. 15,503.

trials in which the money judgments were entered, should the district court wherein the motion is filed apply the provisions of subsection (2) of said Rule 60 (b), which contains a one year limitation, or should it apply subsection (6) of said Rule which has no such time limitation?

STATUTES INVOLVED

28 USCA, Rule 60(b), Federal Rules of Civil Procedure, is involved, and is printed in Appendix D hereto, p. 23a.

STATEMENT OF THE CASE

1. The Judgments Involved

In *Sunfire*, the district court on June 7, 1961, entered judgments aggregating $250,000.00 against UMW in favor of Ashlo and Sunfire (A. 3a), and subsequently denied UMW's post-judgment motions for judgment or new trial (A. 4a).

In *Price*, the district court on October 10, 1961, entered a judgment against UMW in Price's favor for $250,000.00 (A. 7-8a) and subsequently denied similar post-judgment motions (A. 7a).

On May 16, 1963, in *Sunfire* (S. 4a) and on April 22, 1963, in *Price* (P. 4a), UMW filed its "Motion to vacate final judgment and order and award defendant . . . a new trial because of newly discovered evidence". On June 13, 1963, the district court overruled the motions (S. 15a; P. 17a).

2. The Motions to Vacate

From UMW's respective motions (4a et seq.), and the affidavits thereto, it appears:

In *Sunfire's* jury trial, the district court, over UMW objections, had permitted evidence to be introduced to the jury of shootings, of the burning of the Ashlo tipple,

and of the destruction of other coal operators' properties by burning and dynamitings without requiring plaintiffs to show who committed such acts and without proving UMW was in any wise connected therewith or was responsible therefor (S. 5a).

Similarly, in *Price's* jury trial, the district court, over UMW objections, permitted the jury to hear evidence of shootings, of the burning of plaintiffs' Kona tipple, and of the destruction of other coal operators' properties by burning and dynamitings without requiring plaintiffs to show who committed those acts and without proving UMW's connection therewith or responsibility therefor (P. 5a).[4]

In both *Sunfire* and *Price* (5a), the admitted testimony included that related by Marian Richey (Ritchie) that his three tipples at Sassafras, Viper and Ulvah, Kentucky, burned in July or August, 1959 and he admitted he did not know who burned the tipples. In *Sunfire*, at least seven (S. 5a), and in *Price* at least five (P. 5-6a), other coal operators were permitted to testify concerning property damages at their respective operations without proving who committed such acts.

On *April 3, 1963*, William Perkins furnished to Harrison Combs, of counsel for UMW, a copy of an affidavit of Ira Kilburn, a citizen and resident of Hazard, Perry County, Kentucky, which had been introduced as part of a deposition in a hearing conducted by the City Council of said city, in a proceeding to oust Kilburn as a lieutenant of the Hazard police force (6a, 12a). In the affidavit, Kilburn avows that he has had threats made against his

[4]On October 3, 1964, the Sixth Circuit affirmed the money judgment in *Price* against UMW. The opinion appears at 336 F. 2d 771 (Adv. Op. Nov. 9, 1964). A petition for writ of certiorari therein is presently being prepared for filing in this Court.

life because of knowledge he had of "certain acts" committed during the 1959 strike (8a) and he identifies numerous individuals who, according to his affidavit, destroyed the tipples at Sassafras and Viper, Kentucky, and identifies numerous other persons who, according to said affidavit, engaged in sundry shooting, burning and dynamiting activities during the strike of 1959 (6a, 8a).[5] Kilburn names himself as a participant in three incidents (9a). The persons named in the Kilburn affidavit, as UMW is advised, at the time of the strike in 1959 were neither officers, members, employees nor agents of UMW. Some of the persons so identified were city police officers (12-13a); others were operators in the coal industry (6a, 12a).[6]

Kilburn's affidavit recites that he is "making this statement due to fear for my life and in the event that I should lose my life, I want this statement presented to the Grand Jury for its consideration" (9a).

The notary of the Kilburn affidavit was H. B. Noble, a practicing attorney at Hazard, Kentucky, [and one of UMW attorneys in the cases, *post* p. 20] whose certificate attests that the affidavit was typed by him and that Kilburn "thereafter read the same, and then signed, acknowledged and delivered the same under oath to be true and correct" (10a). While the notary's certificate on the Kilburn affidavit bears date August 10, 1962 (10a), in the April 15, 1963 affidavit of H. B. Noble, attached to the motion to vacate (10-11a), Noble states he was consulted by Kilburn on August 10, 1962; *the consultation was on a professional basis as attorney and client;* and

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[5]The "Kilburn Affidavit" attached to the Motion is found in Appendix C herein, p. 13a, and in both certified appendix records at p. 8a.

[6]Such information to UMW appears in the "Affidavit of William Perkins", which is found in both certified appendix records at p. 8a.

the client "requested prior to the preparation of the affidavit, that I keep secret that which he desired to make known to me"; and that "with this understanding" between them, the Kilburn affidavit was prepared (10-11a). Noble further avows (11a), consistent with the recitations of the Kilburn affidavit (9a), that when Kilburn's affidavit was prepared "the said Ira Kilburn informed" Noble "he had had threats made against his life and that he was afraid for his life and that he wanted the affidavit made in the event that anything should happen to him that the affidavit could be presented to the grand jury for its consideration" (11a). According to Noble, he "maintained the trust" placed in him by Kilburn and that "the same was never divulged to anyone in keeping with this affiant's ethics and in accordance with" Kentucky Revised Statutes 421.210(4) [11a].[7]

In William Perkins' affidavit, Perkins avows he first learned of the Kilburn affidavit on March 22, 1963, after the local radio station had carried a news item about the hearing which had been held by Hazard's Board of Commissioners, on charges filed against Kilburn as a member of the City Police force; that the news item stated an affidavit had been filed during the hearing which implicated a number of people as having participated in events occurring during 1959; that he (Perkins) then contacted attorney Combs and advised him of the news item; and that he later saw a copy of the affidavit filed in the hearing (12a).[8]

As the Motion asserts, in the absence of direct evidence

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[7]See "Noble Affidavit" in both certified appendix records, p. 10a.

[8]Attached to William Perkins' affidavit is a copy of the Ira Kilburn affidavit (13a), which Perkins states is a copy filed "at the time of the hearing before The Board of Commissioners of the City of Hazard, Kentucky on March 21st, 1963" (13a).

that UMW agents were responsible for property damages, the jury verdict and judgments based thereon necessarily resulted from unwarranted inferences arising from picketing activities; and if statements in the Kilburn affidavit are true, then statements therein and in the Perkins affidavit demonstrate that persons with no connection or agency with UMW engaged in activities of a character similar to those in the record and which persons are charged with committing some acts for which the jury held UMW liable and who could be found in a court proceeding to have committed the other activities attributed to and imputed to and imputed to UMW without supporting evidence (7a).

The motion also asserts the matters presented are material and relevant and are not cumulative of evidence in the record; that "they have only recently been made available to UMW" which should be given the opportunity of presenting such matters in a new trial in the district court; and that if the motion be granted, UMW intends to subpoena Kilburn as a witness in the new trial to examine him concerning statements contained in his affidavit (6-7a).

3. Plaintiffs' Responses to UMW's Motions to Vacate

Neither in Sunfire nor in Price did plaintiffs therein file any counter-affidavits.

In responses to UMW's Motions (13-14a), plaintiffs asserted that "The motion is based upon Rule 60(b)(2). The Rule provides that such motion must be made 'not more than one year after the judgment, order, or proceeding was entered or taken.'" The responses also showed that in *Sunfire* and in *Price* (14a) that judgments were taken in said cases on June 7, 1961, and October 10, 1961,

respectively, by reason whereof UMW is "therefore barred by the Rule under which it is proceeding".[9]

4. The District Court's Memorandum and Orders

In its Memorandum, the district court rejected UMW's contention that Rule 60(b)(6), Federal Rules of Civil Procedure, governs (A. 2-3a). It sustained plaintiffs' contention, declaring that the district court "is convinced that the defendant's motion comes too late to claim relief under Rule 60(b)" (A. 2a). It reasoned that, "Under the most liberal view, it can be characterized as no more than a motion for relief on the ground of newly discovered evidence", adding, "That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions" (A. 2a). It professed that "The sixth subdivision of Rule 60(b) is by its very language limited to apply only to situations not covered by any of the other subdivisions and has been so construed by numerous court opinions" (A. 3a), citing *Klapprott* v. *United States*, 335 U.S. 601 (1949); *Federal Deposit Insurance Corp.* v. *Alker*, 3 Cir., 234 F. 2d 113 (1956); *United States* v. *Karahalias*, 2 Cir., 205 F. 2d 331 (1953); *Federal Deposit Insurance Corp.* v. *Alker*, E. D. Pa., 30 F.R.D. 527 (1962); *Davis* v. *Wadsworth Construction Co.*, E. D. Pa., 27 F.R.D. 1 (1961). On June 13, 1963 the district court overruled UMW's motions (S. 15a, P. 17a).

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[9]Other grounds of objection asserted by plaintiffs were that defendant made no showing of diligence in trying to discover or produce Kilburn as a witness upon the trial; the material proffered in support of UMW's motion would not be competent or admissible; the alleged factual matter is merely collateral to the main issues in the case; and "evidence which defendant apparently hopes it could adduce upon a second trial is not of such a nature as would probably change the outcome", but is cumulative (13-14a).

5. The Sixth Circuit's Majority and Dissenting Opinions

Upon appeal, heard by a panel of three Circuit Judges, the Sixth Circuit (Circuit Judge Edwards dissenting) affirmed the district court (A. 22a), rejected UMW's position that *Klapprott* v. *U. S.*, 335 U. S. 601, challenged the district court's holding that UMW's motion was subject to the one-year time limitation of Rule 60(b)(2) rather than Rule 60(b)(6), and declared that "All that defendant's motions seek is the opportunity to put Kilburn on the stand at a retrial, or to examine him to discover new evidence to be used on a retrial" (A. 17a).

Circuit Judge Edwards disagreed that "the stringencies of Federal Rules of Civil Procedure require the federal courts to leave in limbo the astonishing charges upon which these motions were based" (A. 18a).

The majority opinion premises its conclusion upon (a) that UMW's motion and supporting affidavits do not assert that *Sunfire* or *Price* witnesses swore falsely or (b) that plaintiffs committed fraud by suing for injuries of their own doing or knowingly used false testimony (A. 17a).

But, Circuit Judge Edwards' dissent appropriately notes that in *Sunfire* and in *Price*, "many acts of violence, destruction and depredation were committed, most of them by *unnamed and unidentified personages, but attributed by plaintiffs, and ultimately by the juries, to*" UMW (A. 18a), that "two episodes of burnings at Ritchie's Tipples were the subject of testimony by Ritchie" in both cases and therein the trial court charged the jury in substance that such testimony could be considered as part of a pattern of violence which occurred during the course of the strike, which *Sunfire* and *Price* attributed to UMW (A. 20a); and that the Kilburn affidavit, if believed, sug-

gests the tipples' burnings resulted from an illegal conspiracy between mine operators and agents of law enforcement to perpetrate violence themselves. conceal the source of the perpetration, and ultimately throw the blame therefor upon UMW (A. 21a).

The dissent points out with cogency that which the majority opinion ignored, namely, that "These motions and affidavits, however, were not met by counteraffidavits" and their factual allegations "stand before us (as they did before the District Judges) undenied" (A. 21a). Disagreeing with the majority's rejection of *Klapprott,* Circuit Judge Edwards points out that the final order in *Klapprott,* reported at 336 U.S. 942 (1949), orders "that the case be remanded to the District Court with a direction to *'receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate'* the judgment" (A. 22a). And, noting that Rule 43(e), Federal Rules, allows the taking of testimony and hearing when a motion contains allegations of facts not appearing in the record, the dissent's view is that UMW's motions herein under consideration "should be remanded to the District Judges, with instructions to take oral testimony on the motions and to determine whether or not there was probable cause to believe the charges contained therein" (A. 22a). Circuit Judge Edwards regarded the allegations of Kilburn as a fraud upon the court (A. 21a); the majority opinion disagreed (A. 17-18a), avowing the law did not allow an excursion to ascertain "something more about Kilburn's interesting affidavit" (A. 18a).

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's affirmance of the district court's holdings that UMW's motion fell within Federal Rule 60(b)(2) rather than subsection (6) thereof conflicts with this Court's principles enunciated and applied in *Klapprott* v. *U.S.*, 335 U.S. 601 (1949).

Rule 60(b), Federal Rules of Civil Procedure (A. 23a), provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)"; and while the Rule provides that a motion based upon subsection (2) be made "not more than one year after the judgment, order, or proceeding was entered or taken", subsection (6) of Rule 60(b) provides the court may relieve a party from a final judgment for "*any other reason justifying relief from the operation of the judgment*", in which event the one-year period has no relation thereto.

While *Klapprott* (335 U.S. 613) was concerned with the first subsection involving excusable neglect, which, like newly discovered evidence under subsection (2), it recites that one asserting grounds found in the first three subsections of Rule 60(b) must do so "not more than one year" after judgment and that the one-year limitation would control "*if no more than 'neglect' was disclosed*", (p. 613) and makes clear subsection (6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice" (p. 615). Hence, in *Klapprott*, this Court be-

lieved, under the circumstances disclosed by the petition, the judgment "should not be considered *only* under the excusable neglect, *but also under the 'other reason' clause* of 60(b), to which the one-year limitation provision does not apply" (p. 614).

Herein UMW's motions were not premised upon newly-discovered evidence *alone*, but also upon the circumstances, as the motion undeniably shows, that such evidence was not known to nor available to UMW until the one-year limitation of subsection (2) had elapsed and, further, that the nature of evidence contained in Kilburn's affidavit is of such type and character that persons with knowledge thereof would naturally keep secret, and thus preclude its availability to UMW.

Though these arguments were presented to the Sixth Circuit[10] by UMW, it is significant that the majority opinion offers no challenge to their validity and carefully avoids any mention of them.

Such failure is emphasized by the district court's statement (A. 2a) "That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions." The Sixth Circuit's failure to take into account the circumstances noted is squarely in conflict with *Klapprott's* mandate that lower courts consider under subsection (6) those circumstances which occasion a delay beyond the one-year limitation applicable to the first three subsections in Rule 60(b). The majority's rejection of *Klapprott's* applicability herein, opposed by Circuit Judge Edwards' dissent (*ante*, pp. 10-11), results from its misconception of *Klapprott*.

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[10]*Sunfire* brief (No. 15,502) at page 12-13 and the *Price* brief (No. 15,503) at page 13.

II.

The Sixth Circuit has interpreted UMW's motion in a manner so as to be in conflict with, and render meaningless, the precise purpose for which subsection (6) of Rule 60(b) was adopted.

Moore and Vestal's Moore's Manual (1962), pp. 1924-25, states that Rule 60(b)(6) "is to cover unforeseen contingencies; intended to be a means for accomplishing justice in . . . exceptional situations" and "is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief . . ."

Thus the circumstances upon which UMW relied to support its position emphasize the propriety of implementing subsection (6)'s provision, namely, for "any other reason justifying relief from the operation of the judgment". The majority opinion's obvious failure to consider such circumstances and to apply this Court's profession that "The integrity of the judicial process demands no less" than there be "a full exploration of where the truth lies" (*U.S.* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 241) shows the appropriateness and need for a review of the Sixth Circuit's opinion and judgment by the award of certiorari herein.

III.

The Sixth Circuit's judgment and decision herein conflict with its prior opinion in *L. M. Leathers' Sons* v. *Goldman*, 6 Cir., 252 F. 2d 188 (1958) wherein it expressly implemented the *Klapprott* rule.

Therein, an appellant brought an action in 1953 against appellee for a patent infringement. Following appellee's

answer and counterclaim, the parties agreed appellant would give appellee a free, non-exclusive, irrevocable license in return for appellee's dismissal of its counterclaim and stipulation of a consent judgment and injunction. Pursuant to the stipulation, judgment was entered *April* 26, 1964 and an injunction was issued pursuant to the judgment on *April* 28, 1954. However, no license was issued to appellee; and on *June* 14, *1955* appellee filed its motion which, revised on *November* 4, *1955*, asked the trial court, among other things, to set aside the injunction and judgment entered April 26, 1954 and to set an immediate trial of the action. The district court acquiesced and, in a new trial, dismissed the appellant's action. In an appeal to the Sixth Circuit, appellant complained the consent judgment and injunction were set aside more than a year and a half after entry of the judgment and service of the injunction; but the Sixth Circuit, pointing to *Klapprott,* approved the district court's action in setting aside the judgment and injunction and awarding a new trial, and declared that "Rule 60(b)(6) vests power in the court to enable them to vacate judgments whenever such action is appropriate to accomplish justice" (252 F. 2d 190).

Though *L. M. Leathers' Sons* was relied upon by UMW in the Sixth Circuit, the majority opinion does not mention it and fails to state why it regarded the case as inapposite.

IV.

The Sixth Circuit's judgment and decision herein conflict in principle and result with *Radack* v. *Norwegian American Line Agency, Inc.,* 2 Cir., 318 F. 2d 538 (1963). Therein, plaintiff's action for damages arising out of injuries was dismissed for lack of prosecution; some *fifteen*

months after dismissal plaintiffs moved for, and the district court granted, an order vacating such dismissal; and defendants appealed. Noting that Rule 60(b)(6) "gives the district court a 'grand reservoir of equitable power to do justice in a particular case' ", the Second Circuit declared that (p. 542):

> "Had notice of the entry of judgment been given . . . plaintiffs would have been forewarned of the necessity of moving to vacate within one year if they wished to preserve the grounds on which they could most heavily rely, namely, counsel's inadvertence or *excusable neglect*. Rule 60(b) relief acts as a corrective remedy, mitigating the harsh impact of calendar rules when a litigant's action is dismissed as a result of his counsel's neglect . . . and we hold that it is available in a case such as this."

The Second Circuit made clear (p. 543) that "If no notice of the entry of judgment was ever received by appellees, the district court had the power to vacate the judgment", and it remanded the case for the purpose of affording the appellants the opportunity of showing that notice had been given. It declared (p. 543):

> *"But if notice of the judgment was not sent, the judge has the power, in the exercise of a sound discretion, to grant relief under Rule 60(b)(6)."*

V.

The Sixth Circuit's majority judgment and opinion are erroneous.

A crucial threshold observation is, as Circuit Judge Edwards' dissent notes, UMW's motions, affidavits and the factual allegations they contain stood before the Sixth Circuit and the district court, and now stand before this

Court, *undenied* (A. 21a). Hence, in accord with *Klapprott's* command, the Court "must accept as true the undenied allegations of the petitioner" (335 U.S. 604). Accord: *In re Cremidas Estate*, DC, Alaska, 1953, 14 F.R.D. 15; *Stevens* v. *Stoumen*, DC, E.D. Pa., 1963, 32 F.R.D. 385.

Likewise, the dissent notes, and correctly so, that both *in Sunfire* and *in Price* "many acts of violence, destruction and depredation were committed, most of them by unnamed and unidentified personages, but attributed by plaintiffs, and ultimately by the juries, to" UMW (A. 18a). In both cases, *as the motions recite*, and plaintiffs responses do not contradict, plaintiffs placed before the juries six or seven coal operators, each of whom related property damages at his (or her) mining operations but *without identifying any person connected with such activities*. The dissent states, in particular, that "two episodes of burnings at Ritchie's Tipples were the subject of testimony by Ritchie" in *Sunfire* and *Price* and that in relation to each, "the trial court charged in substance" that such testimony "could be considered by the jury as part of a pattern of violence which occurred" and "which plaintiffs attributed to" UMW (20a).

The dissent of Circuit Judge Edwards points out that, assuming the facts in Kilburn's affidavit fall within his personal knowledge, "we have the suggestion of a major conspiracy between mine operators and agents of law enforcement to perpetrate violence themselves, conceal the source of the perpetration, and ultimately throw the blame for that violence upon" UMW (A. 21a). Continuing, Circuit Judge Edwards declares that "Such an allegation is bound to represent either malicious perjury or suppressed truth" and that "The courts of this land are

not without power to deal with allegations like these, which really charge fraud upon the court" (A. 21a). In disagreement with the majority's rejection of *Klapprott's* applicability herein, the dissent directs attention that this Court's final order in that case, reported at 336 U.S. 942, required a remand to the district court to "receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate" the judgment (A. 22a).

Herein, where the district court, though denying the motions, conceded the pertinency and decisive effect of the facts alleged on the final judgment (A. 2a), the truth or falsity of the matters alleged in the Kilburn affidavit are as vital and crucial to a fair hearing and the according of justice to UMW as to the petitioner in *Klapprott.*

Indeed, Kilburn's affidavit indicates that acts of violence were committed *on a wide-scale basis.* It specifically identified persons who burned "Ritchie's Tipple at Viper, Kentucky"; and it recites that "Ritchie's Tipple at Sassafras, Kentucky was burned by Ritchie's guards" (8a). In light of the expansive program of destruction recited in the Kilburn affidavit (A. 13a) in which persons are identified (none of whom are UMW agents, as William Perkins' affidavit recites and plaintiffs' responses do not deny), the juries could believe that answers to the inquiry as to who had committed the acts for which UMW has been held liable in each of *Sunfire* and *Price* are to be found in the activities of persons named in Kilburn's affidavit and that the wrongful conduct attributed to UMW was perpetrated by persons so identified by Kilburn. Clearly, under the circumstances of these cases, jury findings of UMW liability, based upon inferences, as the findings therein are, could not be regarded as either warranted or fair unless opportunity be given the juries

to have such knowledge, and should the juries believe that those persons named or identified by Kilburn burned the tipples, the juries' further belief and inferences that such persons also committed the other acts of violence would be as reasonable (if not more so since no UMW agent has been named) as believing that UMW agents did so, particularly when no evidence identifies any UMW member or agent.

The burden of proving UMW responsibility and liability rested upon plaintiffs in both *Sunfire* and *Price*. In the absence of plaintiffs' ability to identify those responsible for the acts of depredation, the evidence relating to matters in Kilburn's affidavit, if proved, becomes most pertinent in view of the Sixth Circuit's rule that "A verdict should be directed against the party upon whom rests the burden of proof, where from the evidence the injury claimed could with equal probability have resulted from a cause upon which liability could not be predicated." *Troutman* v. *Mutual Life Ins. Co. of N.Y.*, 6 Cir., 125 F. 2d 769, 773. Cf. *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, which rejects a verdict based upon speculation.

Only by setting aside the final judgment and order entered by the district court, by its awarding UMW a new trial, and by its permitting a jury to consider evidence therein based upon the affidavit's recitals may it be said that a fair trial has been had in this case. Where, as herein, plaintiffs introduced and employed what they themselves admit is only circumstantial evidence to impute responsibility and liability upon UMW, and there is a post-judgment discovery of evidentiary matter which was not available because of its naturally secretive character and which could serve as a basis for jury belief that persons without legal relationship to UMW committed

the wrongful acts, thus exculpating UMW to which has been imputed responsibility when no UMW agent has been named, the need "for a full exploration of where the truth lies" is as vital herein as in *Shotwell* (*ante*, p. 14).

Here such evidence, as the motion shows, was not available to UMW until more than one year after judgment was entered against UMW, when, *on March 22, 1963*, the affidavit's existence and its contents were announced publicly over a radio station after it was filed in a hearing on charges against Kilburn. Further, it was evidence of such type and character that persons with knowledge thereof would naturally keep it secret, thereby precluding its availability to UMW. Thus, the circumstances of the case, as already pointed out, and the nature of the evidence, which the Kilburn affidavit indicates, invoke the provisions of Rule 60(b)(6), Federal Rules of Civil Procedure, which permits the relief for "any other reason justifying relief from the operation of the judgment" and, as already noted, under subsection (6) courts are vested with power "to enable them to vacate judgments whenever such action is appropriate to accomplish justice". *Klapprott* v. *U.S.*, 335 U.S. 615.

The majority opinion (A. 12a) stresses that Kilburn's affidavit was prepared on August 10, 1962 by H. B. Noble (one of UMW's attorneys in the main cases). Noble's affidavit recites the *consultation with Kilburn was on a professional basis as attorney and client* and on Kilburn's request "prior to the preparation of the affidavit, that" Noble "keep secret that which he desired to make known to me" and that "with this understanding", Noble prepared the affidavit (10-11a). Noble's affidavit further recites he "maintained the trust" and "the same

was never divulged to anyone in keeping with this affiant's ethics and in accordance with" Kentucky Revised Statutes 421.210(4) [10-11a], which provides that "No attorney shall testify concerning a communication made to him, in his professional character, by his client or his advice thereon, without the client's consent; . . ."

The circumstances set forth in the motion to vacate invite the exercise of the "grand reservoir of equitable power to do justice" in this case which the authorities show to be vested in district courts. The majority's failure to do so demonstrates its error in holding that subsection (6) is inapposite.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the decisions and judgments of the Sixth Circuit, entered in Cases No. 15,502 and No. 15,503, as aforesaid (*ante*, pp. 1-2) on August 20, 1964.

Respectfully submitted,

HARRISON COMBS,
900 Fifteenth Street, N.W.
Washington 5, D. C.

M. E. BOIARSKY,
511 Kanawha Valley Building
Charleston, West Virginia
Attorneys for Petitioner.

November, 1964

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

SUNFIRE COAL COMPANY, a corporation, and ASHLO COAL COMPANY, a corporation,

Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant.

Civil Action
No. 284

[And now pending, upon appeal, in the United States Court of Appeals for the Sixth Circuit as Case No. 14,832]

Filed June 13, 1963

Order

The motion of the defendant to vacate final judgment and order and award defendant United Mine Workers of America a new trial because of newly discovered evidence in each of the above styled cases is overruled.

See Memorandum.

/s/ Mac Swinford
Mac Swinford
Chief Judge, U. S. District Court

/s/ H. Church Ford
H. Church Ford
Senior District Judge
Serving by Designation

Filed June 13, 1963

Memorandum

The plaintiffs brought this action to recover for damages inflicted on their property through the wrongful conduct of certain employees and agents of the United Mine Workers of America (hereafter UMW) in the course of the coal

strike in the spring of 1959. The court entered judgment for the plaintiffs on October 10, 1961 and on November 30, 1961, overruled motions by the defendant for judgment or, in the alternative, for a new trial. On April 22, 1963, defendant filed a motion in this court to vacate the judgment and for a new trial based on newly discovered evidence.

Attached to the motion is an affidavit by a police officer from Hazard, Kentucky to the effect that certain acts of violence supposed to have been perpetrated by UMW agents were actually committed by persons having no connection with the UMW. The defendant maintains that such evidence would compel findings different from those already made because the court has relied upon circumstantial evidence to connect the damage to the plaintiffs' property and the conduct of the defendant's agents, not upon specific identification of the wrongdoers.

Defendant cites Rule 60(b)(6), F.R.C.P. as the basis for its motion. Rule 60(b) provides that a court may relieve a party from the operation of a final judgment in five enumerated situations, one of which entails newly discovered evidence, and under a sixth subdivision which is a broadly worded catchall to cover situations not embraced in the preceding five subdivisions. The present question stems from the fact that the rule prescribes a one-year time limit for opening a judgment for newly discovered evidence, while there is no definite time limit on the sixth subdivision, the one on which defendant relies.

The court has examined the authorities submitted by both sides and is convinced that the defendant's motion comes too late to claim relief under Rule 60(b). Under the most liberal view, it can be characterized as no more than a motion for relief on the ground of newly discovered evidence. That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions. The sixth subdivision of Rule 60(b) is by its very language

limited to apply only to situations not covered by any of the other subdivisions and has been so construed by numerous court opinions. *Klapprott v. United States,* 335 U.S. 601 (1949); *Federal Deposit Insurance Corp. v. Alker,* 3d Cir., 234 F2d 113 (1956); *United States v. Karahalias,* 2d Cir., 205 F2d 331 (1953); *Federal Deposit Insurance Corp. v. Alker, E.D. Penn.,* 30 F.R.D. 527 (1962); *Davis v. Wadsworth Construction Co.,* E.D. Penn., 27 F.R.D. 1 (1961).

In the case of Sunfire Coal Company, et al v. United Mine Workers of America, No. 284 on the docket at Jackson, Ky., a motion similar to that referred to in the above Memorandum is now pending. For the reasons set out in the above Memorandum, the motion should be overruled. An Order overruling the motion in each of these cases is this day entered.

/s/ Mac Swinford
Mac Swinford
Chief Judge, U. S. District Court

/s/ H. Church Ford
H. Church Ford
Senior District Judge
Serving by Designation

Filed June 7, 1961

Judgment

In accord with the answers of the Jury to interrogatories submitted by the Court upon the conclusion of the trial of this action,

It is the judgment of the Court that the plaintiff Sunfire Coal Company, a corporation, have and recover of the defendant, United Mine Workers of America, the sum of Two Hundred Fifty Thousand ($250,000) Dollars, and its costs herein, and

It is the further judgment of the Court that the plaintiff, Ashlo Coal Company, a corporation, have and recover of

the defendant, United Mine Workers of America, the sum of Fourteen Thousand ($14,000) Dollars, and its costs herein.

This 7th day of June, 1961.

H. CHURCH FORD, *Judge*

Order

Filed June 28, 1961

Pursuant to a previous assignment, the motion of the defendant for a judgment, or in the alternative for a new trial, having been brought on for hearing on Friday, June 23, 1961, and the Court having heard the argument of counsel for the parties, and having considered said motions, and being advised

IT IS ORDERED that the defendant's motion for judgment, and its alternative motion for a new trial, both be, and the same are denied.

This 27th day of June, 1961.

H. CHURCH FORD, *Judge*

NOTE: **The foregoing judgment and order appear in the Record of *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs v. United Mine Workers of America, Defendant*, Civil Action 284 in the United States District Court for the Eastern District of Kentucky—Jackson, and docketed in the United States Court of Appeals for the Sixth Circuit as Case No. 14,832, styled *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs-Appellees v. United Mine Workers of America, Defendant-Appellant.* The judgment and order above appear in the Appendix filed by Appellant, United Mine Workers of America, at pages 12a and 17a, respectively.**

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 559

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners dba ELKHORN COAL COMPANY, *Plaintiffs*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant.*

Filed June 12, 1963

Memorandum

The plaintiffs brought this action to recover for damages inflicted on their property through the wrongful conduct of certain employees and agents of the United Mine Workers of America (hereafter UMW) in the course of the coal strike in the spring of 1959. The court entered judgment for the plaintiffs on October 10, 1961 and on November 30, 1961, overruled motions by the defendant for judgment or, in the alternative, for a new trial. On April 22, 1963, defendant filed a motion in this court to vacate the judgment and for a new trial based on newly discovered evidence.

Attached to the motion is an affidavit by a police officer from Hazard, Kentucky to the effect that certain acts of violence supposed to have been perpetrated by UMW agents were actually committed by persons having no connection with the UMW. The defendant maintains that such evidence would compel findings different from those already made because the court has relied upon circumstantial evidence to connect the damage to the plaintiffs' property and the conduct of the defendant's agents, not upon specific identification of the wrongdoers.

Defendant cites Rule 60(b)(6), F.R.C.P. as the basis for its motion. Rule 60(b) provides that a court may relieve a party from the operation of a final judgment in five enumerated situations, one of which entails newly discovered

evidence, and under a sixth subdivision which is a broadly worded catchall to cover situations not embraced in the preceding five subdivisions. The present question stems from the fact that the rule prescribes a one-year time limit for opening a judgment for newly discovered evidence, while there is no definite time limit on the sixth subdivision, the one on which defendant relies.

The court has examined the authorities submitted by both sides and is convinced that the defendant's motion comes too late to claim relief under Rule 60(b). Under the most liberal view, it can be characterized as no more than a motion for relief on the ground of newly discovered evidence. That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions. The sixth subdivision of Rule 60(b) is by its very language limited to apply only to situations not covered by any of the other subdivisions and has been so construed by numerous court opinions. *Klapprott v. United States*, 335 U.S. 601 (1949); *Federal Deposit Insurance Corp. v. Alker*, 3d Cir., 234 F2d 113 (1956); *United States v. Karahalias*, 2d Cir., 205 F2d 331 (1953); *Federal Deposit Insurance Corp. v. Alker, E.D. Penn.*, 30 F.R.D. 527 (1962); *Davis v. Wadsworth Construction Co.*, E.D. Penn., 27 F.R.D. 1 (1961).

In the case of Sunfire Coal Company, et al v. United Mine Workers of America, No. 284 on the docket at Jackson, Ky., a motion similar to that referred to in the above Memorandum is now pending. For the reasons set out in the above Memorandum, the motion should be overruled. An Order overruling the motion in each of these cases is this day entered.

/s/ Mac Swinford
Mac Swinford
Chief Judge, U. S. District Court

/s/ H. Church Ford
H. Church Ford
Senior District Judge
Serving by Designation

Filed June 13, 1963

Order

The motion of the defendant to vacate final judgment and order and award defendant United Mine Workers of America a new trial because of newly discovered evidence in each of the above styled cases is overruled.

See Memorandum.

/s/ Mac Swinford
Mac Swinford
Chief Judge, U. S. District Court

/s/ H. Church Ford
H. Church Ford
Senior District Judge

June 12, 1963

Filed October 10, 1961

Order and Judgment

On October 6, 1961 at Covington, came the parties by their respective attorneys and the jurors, as on October 2, 3, 4 and 5 and the introduction of evidence for the defendant was resumed, but not concluded at the hour for noon recess. The Court admonished the jurors and a recess was announced until 1:15 p. m.

At 1:15 p. m. with the parties present by counsel and the jurors as before the recess, the jurors retired from the court room on direction of the court. Counsel for the defendant moved the Court for a new trial and after hearing counsel for both sides, the Court being advised, overruled the motion.

The defense counsel announced that no further evidence would be introduced and renewed its motions to set aside the swearing of the jury, to strike evidence and for a directed verdict. The Court being advised overruled the motions and each of them.

Counsel for the plaintiff then moved the Court to direct the jury to return a verdict for the plaintiff and to submit to the jury only the question of the amount of damages due the plaintiff. The Court being advised overruled the motion.

Thereupon the jurors returned into open Court and closing arguments to the jury were made by Mr. Ware for the defendant and Mr. Patterson for the plaintiff.

The Court instructed the jurors and submitted to them Interrogatories for answers. After discharge of the two alternate jurors the jury retired to the jury room to consider the case. Later it returned into open court and in the presence of the attorneys for both sides reported its verdict, to-wit:

"We the jury, do agree and find for the plaintiffs the sum of $150,000.00 for compensation, and the sum of $100,000.00 for punitive damages.

Robert E. Luckey
Foreman of the Jury

October 6, 1961."

The five (5) Interrogatories submitted to the Jury were answered and are filed and attached hereto with the Verdict.

On motion of counsel for the defendant, the jurors were polled by the Clerk and each juror answered in the affirmative questions as to whether the answers to the interrogatories and the verdict were his answers and his verdict.

On the Verdict of the jury IT IS ADJUDGED that the plaintiffs shall recover from the defendant the sum of $250,000.00 and their costs herein expended.

Mac Swinford, Judge

October 10, 1961

NOTE: **The foregoing judgment and orders appear in the Record of *R. P. Price, C. H. Kelly and Follace Fields, Partners, d/b/a Elkhorn Coal Company, Plain-***

tiffs v. United Mine Workers of America, Defendant, **Civil Action No. 559 in the United States District Court for the Eastern District of Kentucky—Covington, and docketed in the United States Court of Appeals for the Sixth Circuit as Case No. 15,046, styled *R. P. Price, C. H. Kelly and Follace Fields, Partners, d/b/a Elkhorn Coal Company, Plaintiffs-Appellees v. United Mine Workers of America, Defendant-Appellant.* The judgments and orders above appear in the Appendix filed by Appellant, United Mine Workers of America, at pages 17-8a and 24-5a, respectively.**

APPENDIX C

Nos. 15502-3

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUNFIRE COAL COMPANY and ASHLO COAL COMPANY,
Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners, d/b/a ELKHORN COAL COMPANY,
Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

APPEALS from the United States District Court for the Eastern District of Kentucky.

Decided August 20, 1964.

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

O'SULLIVAN, Circuit Judge. The above appeals, Nos. 15,502 and 15,503, involve identical questions, viz: the propriety of the denial of motions for new trials, both made on the ground of newly discovered evidence. We will dispose of them in one opinion. On June 7, 1961, a final judgment, following a jury verdict, was entered in the United States District Court for the Eastern District of Kentucky in favor of Sunfire Coal Company and Ashlo Coal Company, and against appellant, United Mine Workers of

America, in the total sum of $264,000.00. Such judgment was affirmed by this Court on February 16, 1963. *Sunfire Coal Company* v. *United Mine Workers*, 313 F(2) 108 (CA 6, 1963). On October 10, 1961, a final judgment, following a jury verdict, was entered in the same District Court in favor of R. P. Price, C. H. Kelly and Follace Fields, partners, d/b/a Elkhorn Coal Company, and against the appellant, United Mine Workers of America, in the total sum of $250,000.00. An appeal from the latter judgment is pending in this court.[1]

Each of the aforesaid judgments included awards for compensatory and punitive damages. The actions arose out of alleged depredations committed by members of the defendant United Mine Workers upon the properties and business of the respective plaintiffs during the Mine Workers' massive campaign to obtain contracts from various coal operators in southeastern Kentucky and Northeastern Tennessee. This activity occurred during 1959. The recitations of the facts in our decisions of *Gilchrist* v. *United Mine Workers of America*, 290 F(2) 36 (CA 6, 1960); *Flame Coal Company* v. *United Mine Workers of America*, 303 F(2) 39 (CA 6, 1962); *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F(2) 716 (CA 6, 1960); and *Sunfire Coal Company* v. *United Mine Workers of America*, 313 F(2) 108 (CA 6, 1963), provide a fair description of the character and extent of the activity, violence and destruction that was claimed to characterize the organization methods of the United Mine Workers.

In the *Price* and *Sunfire* cases, now before us on appeal from denial of the motions for new trial, evidence was admitted of shootings, burning, dynamiting and other violence without specifically identifying the perpetrators as being members of the United Mine Workers. Violence at the premises of operators other than the plaintiffs in the particular cases was also admitted as evidence of the grand

[1]Decision of the *Price* case was deferred pending decision of the United States Supreme Court in another case.

scale of the entire operation. This was true also in the other cases which have been before us and the reasons for holding such evidence admissible are set forth in the cases as reported.

On April 22, 1963, in the *Price* case and on May 16, 1963, in the *Sunfire* case, defendant United Mine Workers filed motions each entitled, "Motion to Vacate Final Judgment and Order and Award Defendant United Mine Workers of America a New Trial *Because of Newly Discovered Evidence.*" (Emphasis supplied.) In *Price,* the motion was filed about five months after the expiration of one year from the entry of final judgment and in *Sunfire*, about one year and eleven months after final judgment.

These motions were heard together before District Judges H. Church Ford and Mac Swinford, the trial judges in the respective cases. The motions were denied and in a joint memorandum the judges gave as the reason for such denial the provision of Rule 60(b)(2), F.R. Civ. P., which requires that motions for new trial on the ground of newly discovered evidence must be filed "*not more than one year after the judgment.*" (Emphasis supplied.)

Defendant asserts that the newly discovered evidence would consist of testimony that certain of the acts of violence, arson and destruction were actually committed by persons in no way connected with the United Mine Workers; that they were committed by police officers, mine operators and others. In support of these motions defendant attached an affidavit of an attorney, H. B. Noble,[2] who deposed that on August 10, 1962, one Ira Kilburn, a member of the police force of Hazard, Kentucky, told Noble that he had information as to the identity of persons who had committed numerous crimes connected with the violence at the Kentucky mines. Kilburn's information was composed into an affidavit, sworn to before attorney Noble. Except for confession of his own participation in some of

[2]This attorney was an attorney of record for defendant in both the *Sunfire* and *Price* cases.

the events, all of which were criminal activities, it is not clear whether Ira Kilburn had any personal knowledge of the events which he detailed in his affidavit.[3] Noble's affidavit stated that Ira Kilburn's information was given to

[3]"State of Kentucky
County of Perry Affidavit

"I, Ira Kilburn, state that I am a citizen and resident of Hazard, Perry County, Kentucky; I further state that I am a member of the Hazard Police Force and that I was such during the year of 1959; I further state that I have had threats made against my life on account of my having knowledge of certain acts which were committed during the strike during the year of 1959, and being in fear of my life, I make the following statement concerning the acts and incidents committed by R. D. Cisco, Chief of Police of Hazard, Kentucky, and George Smith, a member of the police department and other persons.

"Ritchie's Tipple at Viper, Kentucky was burned by Paul Tayloe, R. D. Cisco and George Smith.

"Ritchie's Tipple at Sassafras, Kentucky, was burned by Ritchie's guards. The scale house was burned by Paul Tayloe, R. D. Cisco, George Smith and Dick Johnson.

"The union hall at Blackey, Kentucky, was burned and dynamited by Paul Tayloe, R. D. Cisco.

"Doctor Begley's cabin at London, Kentucky, was burned by C. C. Begley, George Smith and Tommy Kilburn.

"Bill Turner's car burned at Sterling Warehouse by Paul Tayloe and R. D. Cisco.

"Nyn Cornett's car at Brown's Fork dynamited by Tommy Kilburn and the dynamite furnished by Paul Tayloe.

"Doug Duff's car burned on by-pass by C. C. Begley, Tommy Kilburn, R. D. Cisco.

"Pokey Gayheart's house burned by C. C. Begley and George Smith.

"Colored Boy's car at top of town mountain burned by George Smith and Tommy Kilburn.

"Union Picket's coffee pot shot off fire by George Smith and Paul Tayloe at Cornettsville, Kentucky.

"Combs Drive-In on Combs Road dynamited by R. D. Cisco, George Smith and *Ira Kilburn*.

"Dipsey Doodle Drive Inn shot up by R. D. Cisco, C. C. Begley and *Ira Kilburn*.

"Dipsey Doodle dynamited by Tommy Kilburn with dynamite furnished by Paul Tayloe.

"Baker's car at Combs, Kentucky shot up by R. D. Cisco, George Smith and *Ira Kilburn*.

"Pistol belonging to George Dewey Baker was stolen out of Baker's car by R. D. Cisco.

"A man that I do not remember his name was arrested for drunken driving and his snub nose pistol was stolen out of his car by R. D. Cisco.

"I am making this statement due to fear for my life and in the event that I should lose my life, I want this statement presented to the Grand Jury for its consideration. *George Smith has made threats against my life and I feel that due to the fact that I have knowledge of the foregoing facts which make the jobs of both George Smith and R. D. Cisco uncertain that they might make some attempt against me.*

"I have read the foregoing two pages and they are true and correct.

"This the 10th day of August, 1962.

/s/ Ira Kilburn."

him, "on a professional basis, as attorney and client," and was to be kept secret by him because Kilburn had said that his life had been threatened and that he, Kilburn, "wanted the affidavit made in the event that anything should happen to him that the affidavit could be presented to the grand jury for its consideration."

The motions for new trial alleged that Kilburn's affidavit was kept secret until on or about March 22, 1963, when it came to light at a hearing of Hazard city officials while investigating charges filed against the deponent Ira Kilburn as a member of the Hazard City Police Force. The record does not disclose how the affidavit went from its confidential and professional custody in the hands of attorney Noble to the Board of Commissioners of the City of Hazard. A further affidavit in support of the motion for new trial set forth that none of the people identified in the Kilburn affidavit were agents, officers or members of the United Mine Workers, but that "Paul Tayloe and Dick Johnson were engaged in the mining business; that R. D. Cisco, George Smith and Tommy Kilburn were members of the Hazard police force during the year of 1959; that C. C. Begley was a member of the Louisville and Nashville Railroad Company's police force and that Ira Kilburn was a member of the Hazard police force during the year of 1959."

It should be observed that Ira Kilburn did not make his affidavit for use as support for defendant's motions, nor is it claimed that he would or could give testimony at a new trial of the "information" contained in his affidavit. The defendant's position is that if given a new trial, "United Mine Workers intends to subpoena the said Ira Kilburn as a witness in a new trial for the purpose of examining him concerning the statements contained in the said 'Kilburn affidavit.'"

It should be further noted that there is no claim made that any of the plaintiffs in *Sunfire* and *Price*, or any of their agents, or employees, knew of or in any way partici-

pated in bringing about the spectacular behavior which Kilburn described. The only occurrence referred to in Kilburn's affidavit which became part of the testimony in either *Sunfire* or *Price* related to the burning of the coal tipple of Marian Richey. The latter testified that his tipples at Sassafras, Viper and Ulvah, Kentucky, were burned in July and August, 1959. He was unable to directly identify the arsonists. No fraud upon the court by the plaintiffs is charged or intimated. Notwithstanding the voluminous evidence of the 1959 reign of terror in the Kentucky coal fields, and defendant's awareness that it was charged with responsibility therefor, the motions for new trial are silent as to any efforts made or diligence employed before, during or after the trials to find evidence, if any there was, that others than those connected with defendant were the perpetrators of the violence visited upon the mine owners. Kilburn's secret was kept by one of the defendant's attorneys, who averred that he was commanded to do so by Kentucky's Revised Statutes, § 421.210(4).[4] Not until the fortuitous disclosures of the investigation into the affairs of the Hazard Police Department did defendant claim that evidence was available that others than their own people were responsible for what happened in 1959.

Relying on *Klapprott* v. *United States*, 335 U.S. 601, defendant asserts that its motion for new trial should not be viewed as subject to the limitations of Rule 60(b)(2) which requires that motions for new trial on the ground of newly discovered evidence be presented within one year after judgment, but rather as coming within subdivision (b) (6) of that rule. That subsection relates to motions bottomed upon "any other reason justifying relief from the operation of the judgment." The latter ground is not subject to the limitation applicable to motions made under Rule 60(b)(2)—"newly discovered evidence"—nor to any specific period of limitation.

[4] "(4) No attorney shall testify concerning a communication made to him in his professional character by his client, or his advice thereon, without the client's consent; . . . ."

We do not read *Klapprott* as supporting defendant's position here. Klapprott there sought to vacate a default judgment cancelling his certificate of naturalization. He was given notice of the petition seeking such judgment, but within the time for his answer he was arrested and convicted of crime and was thereafter held in jail for several years. His motion to vacate the default judgment set forth facts which, if true, would prove that his efforts to defend the denaturalization proceedings were wrongfully thwarted by agents of the United States government. The majority opinion found first that the denaturalization judgment was void for failure of the government to prove the allegations of its petition therefor, and second, that the cause of Klapprott's failure to defend the denaturalization proceedings did not constitute "mistake, inadvertence, surprise or excusable neglect" which, if asserted as ground for relief, would have required his motion to be made within one year after the judgment. Rule 60(b)(1). The court found that Klapprott's motion should be held to be grounded on Rule 60(b)(6), "any other reason justifying relief from the operation of the judgment." The Supreme Court said, "and of course the one year limitation would control if no more than 'neglect' was disclosed by the petition," (335 U.S. 613) —emphasizing that the limitation must be applied if a motion is grounded on any one of reasons (1) (2) or (3), which are governed by the one year limitation.

The motions here involved state in their captions that they ask for a new trial "because of newly discovered evidence," and in the body of each motion they ask for "a new trial upon newly discovered evidence." If, however, the substance of the motions made them something different than the formal label placed on them, defendant should not be denied relief because of such technicality. But the content of the motions and their supporting affidavits disclose that they are nothing more than what their titles proclaim them to be—motions for a new trial on the ground of "newly discovered evidence." To get relief under subsec-

tion (b) (6) they must assert some "other" reason, for such section is limited to "any *other* reason justifying relief. . . ." All that defendant's motions seek is the opportunity to put Kilburn on the stand at a retrial, or to examine him to discover new evidence to be used on a retrial. There is no claim that the *Sunfire* or the *Price* judgments are void or that plaintiffs committed any fraud.

We emphasize two facts. Nowhere in defendant's motions and supporting affidavits is it asserted that any of plaintiffs' witnesses swore falsely, much less that plaintiffs committed fraud on the trial court by suing for injuries of their own doing or by knowingly using false testimony. Plaintiffs' witnesses gave evidence of circumstances from which the jury in each case could, and did, conclude that defendant's people were responsible for the spectacular violence that characterized the 1959 affair. In *Gilchrist, Flame, Osborne* and *Sunfire, supra,* we held that such evidence was sufficient to permit the juries to reach such conclusions.

Since the original draft of this opinion was prepared, we have received Judge Edwards' dissent. Therein it is said that "The courts of this land are not without power to deal with allegations like these *which really charge fraud upon the court,*" and the present motion is therein characterized as one "which represents such a fundamental *charge of fraud upon the court. . . .*" (Emphasis supplied.) Because of this language, we have again scrutinized defendant's motions and their supporting affidavits and fail to find therein the basis for such observations. We do not believe that we should gratuitously supply defendant's motions with allegations which counsel quite obviously avoided making. We further observe that even if the allegations of Kilburn's affidavit be accepted as true, they wholly fail to charge that the plaintiffs, or anyone connected with them, conspired with, cooperated with, or in any way participated in the conduct described by Kilburn.

However much our curiosity might tempt us to find out something more about Kilburn's interesting affidavit, and however much we might desire to allay our wonder as to what notice police authorities may have taken of it, the law denies us such an excursion. Neither the District Judges nor ourselves are at liberty to do violence to the clear language of Rule 60(b)(2) which forbids entertainment of the motions made after the limitation has run.

Judgment affirmed.

EDWARDS, dissenting. I agree with my brethren that on the pleadings before them the District Judges were right in refusing to set aside jury verdicts arrived at after lengthy trials, thus requiring new trials of the issues therein considered.

I do not, however, agree that the stringencies of Federal Rules of Civil Procedure require the federal courts to leave in limbo the astonishing charges upon which these motions were based.

The principal cases[1] arose out of a strike in Harlan County, Kentucky. It was alleged in each of the two cases as to which these motions are filed that many acts of violence, destruction and depredation were committed, most of them by unnamed and unidentified personages, but attributed by plaintiffs, and ultimately by the juries, to defendant, United Mine Workers of America.

Long after the trials, and indeed after the judgment in the *Sunfire* case had been appealed, affirmed and satisfied, and while the appeal in the *Elkhorn* case was pending before this court, defendant moved for new trials, basing the motions on Rule 60(b) and upon an affidavit known as the Kilburn Affidavit, which is hereinafter set forth in full:

---

[1] *Sunfire Coal Co.* v. *United Mine Workers of America*, 312 F.2d 108 (C.A. 6, 1963); *R. P. Price, et al.* v. *United Mine Workers of America*, Case No. 15,046 currently pending before this court.

"Kilburn Affidavit"

"STATE OF KENTUCKY
COUNTY OF PERRY Affidavit

"I, Ira Kilburn, state that I am a citizen and resident of Hazard, Perry County, Kentucky; I further state that I am a member of the Hazard Police Force and that I was such during the year of 1959; I further state that I have had threats made against my life on account of my having knowledge of certain acts which were committed during the strike during the year of 1959, and being in fear of my life, I make the following statement concerning the acts and incidents committed by R. D. Cisco, Chief of Police of Hazard, Kentucky and George Smith a member of the police department and other persons.

"Ritchie's Tipple at Viper, Kentucky was burned by Paul Tayloe, R. D. Cisco and George Smith.

"Ritchie's Tipple at Sassafras, Kentucky was burned by Ritchie's guards. The scale house was burned by Paul Tayloe, R. D. Cisco, George Smith and Dick Johnson.

"The union hall at Blackey, Kentucky, was burned and dynamited by Paul Tayloe, R. D. Cisco.

"Doctor Begley's cabin at London, Kentucky was burned by C. C. Begley, George Smith and Tommy Kilburn.

"Bill Turner's car burned at Sterling Warehouse by Paul Tayloe, and R. D. Cisco.

"Nyn Cornett's car at Brown's Fork dynamited by Tommy Kilburn and the dynamite was furnished by Paul Tayloe.

"Doug Duff's car burned on by-pass by C. C. Begley, Tommy Kilburn, R. D. Cisco.

"Pokey Gayheart's house burned by C. C. Begley and George Smith.

"Colored Boy's car at top of town mountain burned by George Smith and Tommy Kilburn.

"Union Picket's coffee pot shot off fire by George Smith and Paul Tayloe at Cornettsville, Kentucky.

"Combs Drive-In on Combs Road dynamited by R. D. Cisco, George Smith and Ira Kilburn.

"Dipsey Doodle Drive Inn shot up by R. D. Cisco, C. C. Begley and Ira Kilburn.

"Dipsey Doodle dynamited by Tommy Kilburn with dynamite furnished by Paul Tayloe.

"Baker's car at Combs, Kentucky shot up by R. D. Cisco, George Smith and Ira Kilburn.

"Pistol belonging to George Dewey Baker was stolen out of Baker's car by R. D. Cisco.

"A man that I do not remember his name was arrested for drunken driving and his snub nose pistol was stolen out of his car by R. D. Cisco.

"I am making this statement due to fear for my life and in the event that I should lose my life, I want this statement presented to the Grand Jury for its consideration. George Smith has made threats against my life and I feel that due to the fact that I have knowledge of the foregoing facts which make the jobs of both George Smith and R. D. Cisco uncertain that they might make some attempt against me.

"I have read the foregoing two pages and they are true and correct.

"This 10th day of August, 1962.

/s/ "Ira Kilburn"

It appears from another affidavit attached to defendant's motions that the two episodes of burnings at Ritchie's Tipples were the subject of testimony by Ritchie in both of the United Mine Workers' cases which are currently before the court, and that in relation to each, the trial judge charged in substance that testimony pertaining to the burning of each of these Tipples at Viper and at Sassafras, Kentucky, could be considered by the jury as part of a pattern of violence which occurred during the course of this strike, and which plaintiffs attributed to the United Mine Workers.

The Kilburn Affidavit, if it were to be believed, would suggest that in fact Ritchie's Tipple at Viper, Kentucky, and Ritchie's Tipple at Sassafras, Kentucky, were burned as a result of an illegal conspiracy between two or more of the mine operators and the police chief and various members of the police department of Hazard, Kentucky.

If we assume that the affidavit which we have quoted above is either false or of such a second, third, or fourth-hand hearsay nature as to be for all practical purposes valueless as evidence, it is patent that the District Judges were right.

These motions and affidavits, however, were not met by counteraffidavits. The factual allegations they contain stand before us (as they did before the District Judges) undenied.

If we assume, and the terms of the affidavit are broad enough for such an alternative assumption, that the astonishing allegations contained in the Kilburn Affidavit fall within the personal knowledge of the affiant, then, indeed, we have the suggestion of a major conspiracy between mine operators and agents of law enforcement to perpetrate violence themselves, conceal the source of the perpetration, and ultimately throw the blame for that violence upon the defendants in this case. Such an allegation is bound to represent either malicious perjury or suppressed truth.

The courts of this land are not without power to deal with allegations like these, which really charge fraud upon the court.

Rule 43(e) of the Federal Rules of Civil Procedure allows for the taking of testimony and the holding of a hearing on motions when the motion contains allegations of facts not appearing in the record of the trial. Fed. R. Civ. P. 43(e), Evidence on Motion, states:

> "When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may

direct that the matter be heard wholly or partly on oral testimony or depositions."

Rule 60(b) (6) gives power to the court to grant a new trial for any other reason justifying relief from the operation of the judgment. It contains no time limitation. Fraud upon the court would indeed be an "other reason."

The leading case dealing with motions made under Rule 60(b) is *Klapprott* v. *United States*. 335 U.S. 601 (1949).

The final order in *Klapprott* is reported at 336 U.S. 942 (1949) wherein the court ordered that the case be remanded to the District Court with a direction to "*receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate*" the judgment. (Emphasis added.)

I do not believe that a motion which represents such a fundamental charge of fraud upon the court should be disposed of by a disposition based upon a technical time limitation. In my view these motions should be remanded to the District Judges, with instructions to take oral testimony on the motions and to determine whether or not there was probable cause to believe the charges contained therein.

Judgment

(Filed August 20, 1964)

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

NOTE: This judgment was entered by the Sixth Circuit in both Case No. 15,502 and 15,503.

APPENDIX D

28 USCA, Federal Rules of Civil Procedure:

Rule 60. RELIEF FROM JUDGMENT OR ORDER

* * * *

(*b*) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 686.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation, and ASHLO COAL COMPANY, a corporation,

Respondents.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners, d/b/a Elkhorn Coal Company,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JAMES S. GREENE, JR.,
Harlan, Kentucky,

LOGAN E. PATTERSON,
Pineville, Kentucky,

Counsel for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

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BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associat Justices of the Supreme Court of the United States:

Respondents Sunfire Coal Company and Ashlo Coal Company, and R. P. Price, C. H. Kelly and Follace Fields, Partners, d/b/a Elkhorn Coal Company, in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTION PRESENTED.

Where a litigant seeking a new trial, solely on the basis of newly discovered evidence and admittedly more than one year after the entry of judgment, contends that the one-year limitation provided in Rule 60(b) of the Federal Rules of Civil Procedure is made inapplicable because (1) the evidence was not discovered within a year and (2) was of such secret nature that ready revelation would not be expected, and the trial court overrules such motion on the ground that the one-year limitation is applicable, is this ruling in error, and if so, is it an error of such "special and important" character as to justify the granting of certiorari under Rule 19 of this Court?

STATEMENT OF THE CASE.

To correct what they consider inaccuracies and omissions in the petitioner's statement of the case, respondents point out:

(1)

On page 5 of the Petition for Writ of Certiorari, the petitioner asserts, and thereafter assumes as a fact, that the evidence of lawlessness and violence produced upon the trials of these cases completely failed to connect those acts with the petitioner.

It is felt that both the assertion and the assumption are unjustified. It is also considered by respondents to be sufficient, at this point, to call attention to the fact that in both cases juries thought the evidence sufficient to connect the petitioner with the acts. In each case the trial court (different judges) thought the evidence sufficient to show a connection, and the issue was submitted to a jury. In each case the presiding trial judge overruled motion (pursuant to Rule 50, F. R. C. P.) for judgment and al-

ternative motion for a new trial, which motions asserted this same alleged insufficiency of the evidence. In both cases the Court of Appeals thought there was sufficient evidence to justify submission to a jury, and so declared. (*Sunfire Coal Company, et al., vs. United Mine Workers of America*, 313 F. 2d 108, 110; *R. P. Price, et al., vs. United Mine Workers of America*, 336 F. 2d 771, 776; and re-affirmed in both, *Sunfire Coal Company, et al., vs. United Mine Workers of America*, 335 F. 2d 958, 962.) In the *Sunfire* case this same contention was urged upon this Court in a Petition for Writ of Certiorari on the merits, which was denied (375 U. S. 924). It was again urged upon this Court in another Petition for Writ of Certiorari (pursuant to this Court's Rule 20) specifically presenting to the Court the precise relief which is sought in this petition and with substantially the same argument (375 U. S. 924).

As a finality to the *Sunfire* case, that judgment has been completely satisfied by payment of the amount awarded, plus interest and costs.

(2)

Neither do the respondents feel that the petitioner is justified in assuming (as it apparently does) that the denials of its motions were predicated wholly upon the technical one-year limitation bar imposed by Rule 60(b). The footnote to page 9 of the Petition for Writ of Certiorari concedes that other frailties of the motion were pointed out by respondents, and some of these were discussed below.

As stated in the opinion of the Circuit Court, "Notwithstanding the voluminous evidence of the 1959 reign of terror in the Kentucky coal fields, and defendant's awareness that it was charged with responsibility therefor, the motions for new trial are silent as to any efforts made or

diligence employed before, during or after the trials to find evidence, if any there was, that others than those connected with defendant were the perpetrators of the violence visited upon the mine owners. Kilburn's secret was kept by one of the defendant's attorneys, who averred that he was commanded to do so by Kentucky's Revised Statutes, § 421.210 (4)." (335 F. 2d 958, 961.)

That the material proffered in support of the motions for new trial would not be competent or admissible is patent on its face. Manifestly the affidavit of an available individual cannot be admitted as evidence upon a trial. Even the affidavit, as noted by the court below, does not appear to be based upon personal knowledge other than in a relatively few instances wherein the affiant identifies himself as a criminal participant (335 F. 2d 958, 959).

According to the petitioner, Kilburn's affidavit was not made for use in any hearing before "the Board of Commissioners of the City of Hazard" where it allegedly appeared (12a).* It was made because "threats" had been made against his life and "he wanted the affidavit made in the event that anything should happen to him that the affidavit could be presented to the grand jury for its consideration" (8a, 11a). Kilburn, therefore, was in little danger of a perjury prosecution when "the fortuitous disclosures of the investigation into the affairs of the Hazard Police Department" brought his affidavit to public radio announcement by some series of events not disclosed. On the other hand, had his affidavit been given by him for the purpose of supporting a motion in the United States District Court, and had that affidavit been false, his posi-

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* In referring to the certified appendix records mentioned and explained on page 2 of the Petition for Writ, respondents employ the same symbol designation as that employed by petitioner.

tion would have been far less secure, a fact inferentially noted in the court below when it said "It should be observed that Ira Kilburn did not make his affidavit for use as support for defendant's motions, nor is it claimed that he would or could give testimony at a new trial of the 'information' contained in his affidavit" (335 F. 2d 958, 960).

Also of paramount importance is another fact mentioned by the court below:

> "It should be further noted that there is no claim made that any of the plaintiffs in *Sunfire* and *Price*, or any of their agents, or employees, knew of or in any way participated in bringing about the spectacular behavior which Kilburn described. The only occurrence referred to in Kilburn's affidavit which became part of the testimony in either *Sunfire* or *Price* related to the burning of the coal tipple of Marian Ritchie. The latter testified that his tipples at Sassafras, Viper and Ulvah, Kentucky, were burned in July and August, 1959. He was unable to directly identify the arsonists. No fraud upon the court by the plaintiffs is charged or intimated." (335 F. 2d 958, 961.)
>
> * * * * *
>
> "Nowhere in defendant's motions and supporting affidavits is it asserted that any of plaintiffs' witnesses swore falsely, much less that plaintiffs committed fraud on the trial court by suing for injuries of their own doing or by knowingly using false testimony." (335 F. 2d 958, 962.)

Significantly, Kilburn's statement of fear for his life is immediately followed by his identification of George Smith and R. D. Cisco, fellow police officers, as being the persons making the threats (19A, 20A). Petitioner does not even suggest that either of these men had anything to do with the trial of this case, nor were they mentioned throughout either trial.

THE ARGUMENT.

I.

It is asserted that the decisions rendered in the courts below are in conflict with the pronouncements of this Court in *Klapprott vs. United States,* 335 U. S. 601. This same contention was made by this same petitioner in this Court in this same case* as bearing upon the same Question Presented, verbatim. What was said as responsive before seems appropriate again.

In *Klapprott,* the Court was considering a case where a naturalized citizen had been deprived of his citizenship upon a default judgment, rendered without the production of any evidence, and for some four years had been incarcerated and so harassed by governmental authorities as to make it virtually impossible for him to devote any attention to the defense of the denaturalization proceedings, or to seek any relief therefrom. The case arose upon his motion to vacate the default judgment. Among other things, the Government contended that his motion was based upon "excusable neglect," that a motion on such ground fell under subsection (1) of Rule 60(b), and that Klapprott was barred by the one-year limitation stated in Rule 60(b). This Court, however, pointed out that Klapprott's dereliction arose from circumstances which could not be rationally classified as "neglect." On the contrary, the Court pointed out, in substance, that Klapprott's very adversary who had taken a default judgment against him, by other and extraneous tactics of questionable propriety had made it virtually impossible for him to defend himself or to seek earlier relief in the denaturalization case. This was not a case of "neglect," the Court said, but fairly fell within the " 'other reason' clause of 60(b), to which the one-year limitation provision does not apply." (335 U. S. 614.) At the

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* No. 448, October Term, 1963.

same time, however, the Court made it equally clear that, had the motion been based upon facts encompassed in the term "excusable neglect," the one-year period would have been inflexibly applied. It was said:

> "And of course, the one year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b)." (335 U. S. 613.)

Petitioner's incomplete quotation, inferring that the Court had indicated that the above rule should be relaxed whenever "appropriate to accomplish justice" does not convey the Court's true declaration. What the Court said (with our emphasis supplied) was: "In simple English, the language of the 'other reason' clause, *for all reasons except the five particularly specified,* vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." (335 U. S. 614-615.)

In the petitioner's case No. 448 which was previously before this Court, specific reference was made to *United States vs. Karahalias,* 205 F. 2d 331, and excerpts were quoted therefrom. In the present Petition, the petitioner is content to allude to this opinion only as one of the authorities referred to by the court below. In *Karahalias* Judge Learned Hand first agreed with the petitioner's present contention regarding the availability of subsection (6) "to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2) and (3) do not cover, but those that they do." However, upon a rereading of this Court's opinion in the *Klapprott* case, Judge Hand decided that his original interpretation was entirely in error, and that this Court had declared "that subsection (6) did not toll the limitation of the Rule upon any kind of 'neglect,' whatever the excuse might be."

II.

Again it is here insisted by petitioner, as it was in case No. 448, that the decisions in the lower courts are in conflict with the Sixth Circuit's own decision in *L. M. Leathers' Sons vs. Goldman*, 252 F. 2d 188, and in conflict with a decision of the Second Circuit in *Radack vs. Norwegian American Line Agency, Inc.*, 318 F. 2d 538.

From *Radack* the petitioner deduces that the Second Circuit Court of Appeals has enunciated a principle to the effect that Rule 60 (b) (6) confers such a "grand reservoir of equitable power to do justice in a particular case" that the limitations imposed upon motions under subsection (2) may be overlooked in any instance where the court feels it must do "justice." Respondents do not so interpret this case. In that action suit had been dismissed for lack of prosecution. Some fifteen months later, learning of the dismissal, plaintiffs moved to vacate the order of dismissal. It was contended that the motion fell under subsection (1) of Rule 60 (b), and was therefore barred. However, the court pointed out that, in violation of Rule 77 (d) F. R. C. P., no notice had been given of the entry of the dismissal, and that the practice and rules of the trial court were at variance with the official Rules. The court decided that, since the party had been denied a right specifically conferred by law, a reopening of the case under Rule 60 (b) (6) was proper. To illustrate that the petitioner's interpretation of this opinion cannot be successfully maintained, reference can be made to *Costa vs. Chapkines*, 316 F. 2d 541. That case was in the same court (United States Court of Appeals, Second Circuit), involved the same type of procedure (motion to vacate dismissal of plaintiffs' action for want of prosecution), and was before the same judges. However, it did not involve a failure to give notice under Rule 77 (d) F. R. C. P. In the *Costa* case, appellant's

motion, made more than a year after dismissal of the action, was based upon the allegation that their attorney had been seriously ill and had died. In such a case the court said:

> "Their motion must be read as coming clearly within subdivision (1) of the Rule 60(b), Fed. R. Civ. Pro., providing for relief from judgment in cases of '(M)istake, inadvertence, surprise, or excusable neglect.' As such, the motion made over one year after judgment was untimely. When the grounds for relief fall within subdivisions (1), (2) or (3) of Rule 60(b), the Court is restricted by the one-year limitation and cannot grant relief under subdivision (6) which allows motions to be made within a reasonable time." (316 F 2d 541, 542.)

In the *Leathers* case, the litigant *was not* seeking a new trial on the basis of newly discovered evidence. There had been no trial. A consent decree had been entered pursuant to an agreement between the litigants, and one of the litigants was seeking to set aside that decree because his opponent had failed to perform the opponent's part of the bargain which furnished the consideration for the agreed judgment. The relief was not sought for any of the "reasons" described in sub-parts (1), (2), or (3) of Rule 60(b), and therefore was not subject to the one-year limitation.

III.

In support of its contention that "The Sixth Circuit's majority judgment and opinion are erroneous," the petitioner opens its argument upon the premise that, since the allegations in the Kilburn affidavit were "undenied" the Court must accept, as a proposition of law, that the facts therein related are true. The respondents are aware of no rule of law that requires the Court to "accept" any

such proposition. It must be remembered that Kilburn has not made any affidavit *in support of petitioner's motions* (14A). He is said to have made an affidavit before one of the petitioner's attorneys, allegedly motivated by a fear that his life was in danger, in consequence of which he wished to have information for presentation to a grand jury in the event he should be harmed. This is the substance of the "Noble Affidavit" (10a). It is also said that this affidavit, imparted in such secrecy and confidence, in some unexplained fashion turned up in some proceeding before a city council or board of commissioners, and was publicly announced over the radio. Such is asserted in the "Affidavit of William Perkins" (12a). *For the purpose of supporting petitioner's motions,* no one—not even Kilburn—says that the statements in his affidavit are true. For the purpose of supporting those motions, no one even says that they *think* Kilburn's accusations are true, and this includes the petitioner itself. All the petitioner says is that, *if* Kilburn's statements are true, they are important, and if it can get new trials, it will subpoena Kilburn as a witness "for the purpose of examining him concerning the statements contained" in his affidavit (7a). This form of presentation, in the opinion of respondents, does not obligate the Court to accept as true anything appearing in Kilburn's alleged affidavit.

The remainder of the petitioner's argument is largely predicated upon the dissenting opinion of Circuit Judge Edwards wherein Judge Edwards perceived "the suggestion of a major conspiracy between mine operators and agents of law enforcement" which he thought represented "either malicious perjury or suppressed truth" which constituted a "charge of fraud upon the court." This view was not disregarded nor lightly treated in the appellate Court, for the majority said:

"Because of this language, we have again scrutinized defendant's motions and their supporting affidavits and fail to find therein the basis for such observations. We do not believe that we should gratuitously supply defendant's motions with allegations which counsel quite obviously avoided making. We further observe that even if the allegations of Kilburn's affidavit be accepted as true, they wholly fail to charge that the plaintiffs, or anyone connected with them conspired with, cooperated with, or in any way participated in the conduct described by Kilburn." (335 F. 2d 958, 962.)

Neither, we might add, do the petitioner's motions or supporting affidavits indicate that the plaintiffs or anyone connected with them knew any of the facts related in the Kilburn affidavit (if true) at the time of trial, falsely testified with reference to any of such alleged facts, or participated in the suppression of the alleged facts during the trial.

It is submitted that the Circuit Court's majority accurately and ably evaluated the motions here before the Court in the following language:

"The motions here involved state in their captions that they ask for a new trial 'because of newly discovered evidence,' and in the body of each motion they ask for 'a new trial upon newly discovered evidence.' If, however, the substance of the motions made them something different than the formal label placed on them, defendant should not be denied relief because of such technicality. But the content of the motions and their supporting affidavits disclose that they are nothing more than what their titles proclaim them to be—motions for a new trial on the ground of 'newly discovered evidence.' To get relief under subsection (b) (6) they must assert some 'other' reason, for such section is limited to 'any *other* reason justifying relief * * *' All that defendant's motions seek is

> the opportunity to put Kilburn on the stand at a retrial, or to examine him to discover new evidence to be used on retrial. There is no claim that the *Sunfire* or the *Price* judgments are void or that plaintiffs committed any fraud." (335 F. 2d 958, 962.)

The leading text writers are clearly in accord with this view. In *Moore's Federal Practice,* Volume 7, page 321, it is said:

> "This maximum period of one year is not subject to enlargement by the court; and may not properly be circumvented by a utilization of any of the other clauses, (4), (5), or (6), which are subject only to a reasonable time limitation, where the reason for relief is embraced within clauses (1), (2), or (3)."

Again, in the same volume, page 295, it is made clear that sub-clause (6) should not be used to extend the time limitation applicable to clauses (1), (2) and (3):

> "In reference to the first qualification, the very cast of the Rule and the language of clause (6) indicate that this residual clause is dealing with matter not covered in the preceding five clauses. Further the maximum time limitation of one year that applies to clauses (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under clause (6) for reasons covered by clauses (1), (2) and (3)."

In *Barron & Holtzoff,* Volume 3, Federal Practice and Procedure, page 421, it is said:

> "A motion under clauses (1), (2) or (3) must be denied as untimely if made more than one year after judgment regardless of whether the delay was reasonable."

CONCLUSION.

The respondents believe themselves entitled to a denial of the Petition for Writ of Certiorari herein presented.

Respectfully submitted,

JAMES S. GREENE, JR.,
Harlan, Kentucky,

LOGAN E. PATTERSON,
Pineville, Kentucky,
Counsel for Respondents.